TER AH CHAI

v.

THE TIMES PACKAGING CO SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NIK HASHIM J
[ORIGINATING MOTION NO: R3-25-90-96]
1 SEPTEMBER 1998

LABOUR LAW: *Industrial Court - Award - Reinstatement ordered - Whether backwages can be limited - Extent of court's power to make award - Industrial Relations Act 1967, s. 30(6)*

LABOUR LAW: *Employment - Unjust dismissal - Backwages - Whether backwages can be limited - Factors to be taken into account in scaling down backwages*

LABOUR LAW: *Employment - Backwages and reinstatement - Distinction between the two - Whether full backwages must be ordered when reinstatement ordered*

This was an application to quash one part of an Industrial Court award which ordered payment of backwages subject to a maximum of 24 months. The applicant contended that since the court also ordered him to be reinstated, it had erred in law and/or acted in excess of its jurisdiction by limiting backwages. Instead, he claimed he was entitled to full backwages from the date of dismissal to the date of reinstatement. The respondent submitted that under the Industrial Relations Act 1967 ('the Act'), the Industrial Court has wide powers to make any award it deems necessary or expedient for settling the reference to it under s. 20(3) of the Act.

No reasons were given by the Industrial Court for limiting the backwages and this provoked the applicant to submit that a decision without reasons was an irrational one. This notwithstanding, it was in evidence that the Industrial Court found the applicant to be careless and negligent in his duties but that these did not justify dismissal. It was further in evidence that the date of reference and the date of the award were separated by 33 months. A final point to note was the averment in the respondent's affidavit in reply that the applicant was employed during his enforced dismissal. The admissibility of this evidence was objected to by the applicant on the ground that the respondent did not apply to the court to adduce fresh evidence.

Held:

[1] By virtue of s. 30(6) of the Act, the Industrial Court has wide powers to make any award that it deems necessary or expedient for settling a trade dispute or a reference to it under s. 20(3) of the Act. Indeed, it can even create rights and obligations though such a power must be exercised reasonably and not arbitrarily.

[2] Delay, income earned by a workman during his enforced dismissal, and the act of the workman's misconduct are relevant factors which the Industrial Court may take into account in denying or scaling down the quantum of backwages.

[3] The evidence objected to by the applicant was filed in reply to the applicant's affidavit in support of the motion and was therefore part of the case record and not fresh evidence.

[3a] The failure to contradict a positive assertion upon a material issue amounts to an admission of the fact so asserted. Thus, since the averment in the affidavit in reply was not rebutted, it was a relevant factor to be taken into account.

[4] Practice Note No. 1 of 1987 issued by the President of the Industrial Court on the method of calculation for compensation prescribes backwages to be paid in full from the date of dismissal to the date of conclusion of hearing, subject to a maximum of 24 months. This Practice Note is only a directive which has no statutory force and is not meant to stifle the legitimate discretion of the court in appropriate cases. However, it was issued as a guideline for the purpose of creating some kind of uniformity and consistency in Industrial Court awards and there have been numerous cases following the Practice Note.

[4a] Limiting backwages to a maximum of 24 months is not only consistent with Practice Note No. 1 of 1987 but is also in accordance with the established principle of equity and good conscience of the industrial relations practice.

[5] 'Reinstatement' and 'backwages' are two separate and independent things. The order of reinstatement is a prospective order whereas the order of backwages is ordered to take effect retrospectively.

[6] The Industrial Court, in exercising its wide powers when awarding reinstatement, has the discretion to reduce the backwages if there are cogent reasons to do so.

[7] A decision without reasons is not irrational if there is evidence to support it. In the instant case, there are cogent reasons for the backwages to be scaled down.

[Application dismissed with costs.]

Cases referred to:
Chan Hock Liong v. Associated Industries (M) Sdn Bhd [1998] 3 CLJ Supp 105 ***(refd)***
Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(refd)***
Edaran Otomobil Nasional Sdn Bhd v. Neoh Hock Lye & Ors [1990] 1 ILR 163 ***(refd)***
Ng Hee Thoong v. Public Bank [1995] 1 CLJ 609 ***(refd)***
SK Verma v. Industrial Tribunal-cum-Labour Court, New Delhi [1981] AIR 422 ***(refd)***
Utusan Melayu (M) Bhd v. National Union of Journalists, Malaysia [1991] 2 ILR 840 ***(refd)***
Utusan Melayu (M) Bhd v. National Union of Journalists, Malaysia [1992] 2 ILR 117 ***(refd)***
Viking Askim Sdn Bhd v. National Union of Employees in Companies Manufacturing Rubber Products & Anor [1990] 2 ILR 634 ***(refd)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Anor Appeal [1995] 3 CLJ 344 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(3)

Other sources referred to:
Judicial Review of Administrative Action, De Smith, Woolf & Jowel, 1995, 5th edn, p 559
Law of Industrial Disputes, OP Malhotra, 1985, vol II, 4th edn, p 960
Practice Note No. 1 of 1987 (Industrial Court)

For the applicant - P Kuppusamy; M/s P Kuppusamy & Co
For the respondent - Julia Mah; M/s Albar Zulkifly & Yap

Reported by S Dharmendran

JUDGMENT

Nik Hashim J:

The Application

This is an application for an order of *certiorari* to quash a part of the Industrial Court award No. 333 of 1996 dated 31 July 1996.

Facts Of The Case

Briefly the facts of the case are as follows.

The applicant commenced employment with the respondent on 1 November 1988 as a Sales Manager. His last held position was as general sales manager. On 27 January 1992 he was dismissed for five allegations of misconduct (*vide* letter "TAC 1" of encl. 3). The applicant then made representations to the Industrial Relations Department that he had been unfairly dismissed. The matter was referred to the Industrial Court for an award. The Industrial Court held that the applicant had been dismissed without just cause and excuse and made the following orders:

> 1. The Company (the Respondent) shall reinstate the Claimant (the Applicant) to his former position as General Sales Manager from the 15 September 1996 without any loss of wages, allowances, seniority, service and benefits of any kind.
>
> 2. The Company (the Respondent) shall pay the claimant (the Applicant) arrears of wages from the date of dismissal (27.1.92) to the last date of hearing (17.10.95) to a maximum of 24 months:
>
> ie. RM3,500.00 x 24 = RM84,000.00.
>
> 3. The above payment (less any income tax and E.P.F. contributions) shall be paid within one month from the date of his award to the Claimant (the Applicant) through his counsel.

The Issue

It is the second part of this order that is being impugned. The issue before this court is whether the decision of the Industrial Court to limit the backwages awarded to the applicant to twenty-four (24) months salary despite the fact that he was reinstated to his former position in the respondent company is correct.

The Applicant's Contention

It is the contention of Mr. P. Kuppusamy, learned counsel for the applicant, that in ordering the applicant to be reinstated, the Industrial Court had erred in law and or acted in excess of its jurisdiction by limiting the backwages to twenty-four (24) months salary. The applicant's contention is that he should be paid full backwages from the date of dismissal 27 January 1992 to the date of reinstatement ie, 15 September 1996, a period of 56 months and he is requesting this court to make an order requiring the respondent to pay him the balance of arrears of RM113,633.33 which he claims he is entitled to.

The Respondent's Contention

Ms. Julia Mah, learned counsel for the respondent, submitted that the applicant's contention that he is entitled to full arrears of wages because he was reinstated to his former position, has absolutely no basis in law. According to her, under the provisions of the Industrial Relations Act 1967 (the Act), the Industrial Court has wide powers to make any award that it deems necessary or expedient for settling the trade dispute or the reference to it under s. 20(3) of the Act.

The Law

Under the law, the Industrial Court has wide powers, including the power to limit backwages to twenty-four (24) months. In *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Anor Appeal* [1995] 3 CLJ 344; [1995] 2 MLJ 753, the appellant contended that the Industrial Court had no jurisdiction to limit to 12 months salary after holding the dismissal unfair. The Federal Court rejected the contention and held that the Industrial Court was entitled to do so. Thus, the Industrial Court has wide powers to make any award that it deems necessary or expedient for settling a trade dispute or a reference to it under s. 20(3) of the Act. Indeed, it can even create rights and obligations though such a power must be exercised reasonably and not arbitrarily (*M/s. Viking Askim Sdn Bhd v. National Union of Employees in Companies Manufacturing Rubber Products & Anor.* [1990] 2 ILR 634).

Section 30(6) of the Act provides:

> In making its award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under s. 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under s. 20(3).

In the leading case of *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304, Hashim Yeop A. Sani J (as he then was) at p. 307 para. I said:

> A reinstatement order carries with it a *prima facie* right to an order for the recovery of wages since the date of dismissal. Such an order is ancillary to the order of reinstatement. But circumstances vary from case to case and an employer should be entitled to a remission for various reasons, for example, for any delay in the finalisation of the order which is not entirely his fault.

Besides delay, the income earned by the workman during his enforced dismissal and the act of the workman's misconduct are also relevant factors which the Industrial Court may take into account in denying or scaling down quantum of backwages. O.P. Malhotra on the *Law of Industrial Disputes,* Vol. II, 4 Edn 1985 at p. 960 said:

The extent of income, if any, earned by the workman elsewhere during the period of his enforced unemployment and the nature of the efforts of the absence thereof, on his part, to secure alternative gainful employment, will be the relevant factors to be taken into account in denying or scaling down quantum of backwages. Once the relevant facts are brought on record, there will be no defect in calculating the income, if any, earned by the employee elsewhere. Likewise if the workman is found guilty of misconduct or lapse on his part, it is within the discretion of the Tribunal not to award wages for the period during which he may have remained out of employment.

(See *Chan Hock Liong v. Associated Industries (M) Sdn. Bhd.* [1998] 3 CLJ Supp. 105.)

Findings Of The Court

In the present case, the Industrial Court awarded reinstatement and payment of backwages to the applicant. Unfortunately, the learned chairman did not give reasons for the backwages to be reduced to twenty-four (24) months in the award. Mr. P. Kuppusamy submitted that a decision without reasons is an irrational decision and quoted *Judicial Review of Administrative Action* by De Smith, Woolf & Jowel, 5 Edn. 1995 at p. 559 in support. In my view, a decision without reasons is not irrational if there is evidence to support the decision.

On perusal of the award, I find there are cogent and valid reasons to justify the scaling down the backwages to twenty-four months. (*SK Verma v. Industrial Tribunal-cum-Labour Court, New Delhi* [1981] AIR 422). They are as follows.

Firstly, the most obvious one is the Industrial Court's finding of misconduct on the part of the applicant. The learned chairman at p. 17 of the award made a finding of fact that the court was of the view that the applicant was careless and negligent in his duties in that he failed to submit the Lever Brothers Sdn. Bhd.'s cheque as soon as he received it since he knew that the company was in dire financial straits. However, the learned chairman opined that mere carelessness was not an adequate ground for dismissal.

Secondly, there is also an element of delay in the disposal of this award. The reference was made on 22 October 1993 and the award was given on 31 July 1996 – a delay of 33 months through no fault of any party. As adverted to earlier, the delay is also a basis for limiting the backwages (see *Dr. A. Dutt, supra*).

Thirdly, counsel for the respondent sought to bring in evidence of the applicant's employment during the enforced dismissal through the evidence of affidavit in reply of Rashidah bte Hashim (encl. 22), the general manager of the respondent, as a further ground to justify the scaling down the backwages

to 24 months. On this point, the applicant's counsel objected by saying that the affidavit evidence with regard to employment amounts to fresh evidence and urged the court to disregard it as there was no application by the respondent to adduce fresh evidence before this court; and that there was no evidence before the Industrial Court that the applicant was earning and employed during the enforced dismissal. It is to be noted that Rashidah's affidavit was filed in reply to the applicant's affidavit in support of the motion. Rashidah, at para. 12 and 13 in her affidavit, averred that the applicant was gainfully employed during the enforced dismissal and this averment has not been rebutted by the applicant. It is trite law that failure to contradict a positive assertion upon a material issue amounts to an admission of the fact so asserted. (See *Ng Hee Thoong v. Public Bank* [1995] 1 CLJ 609; [1995] 1 MLJ 281 CA). Rashidah's affidavit evidence with regard to the employment is therefore not a fresh evidence. It was filed for the purpose of the motion and therefore, it is part of the case record. Since the evidence of the employment has not been rebutted and hence admitted, then it is a relevant factor to be taken into account in scaling down the quantum of backwages (see *Chan Hock Liong, supra*).

Lastly, the practice of the Industrial Court to reduce backwages to twenty-four (24) months is not new. On 29 June 1987, the President of the Industrial Court issued the Practice Note No. 1 of 1987, the relevant part of which states:

Method Of Calculation Of Compensation

(a) Back pay in full from the date of dismissal to date of conclusion of hearing, subject to a maximum of 24 months.

This Practice Note, as the words imply, is only a directive which has no statutory force, issued as a guideline for the purpose of creating some kind of uniformity and consistency in the awards. It is not meant to stifle the legitimate discretion of the court in appropriate cases. The following cases are some of the numerous Industrial Court cases which follow the Practice Note:

(i) *Edaran Otomobil Nasional Sdn. Bhd. v. Neoh Hock Lye, Quah Poh Huat, Lee Cheow Liam* [1990] 1 ILR 163;

(ii) *Utusan Melayu (M) Bhd. v. National Union of Journalists, Malaysia* [1991] 2 ILR 840;

(iii) *Utusan Melayu (M) Bhd. v. National Union of Journalists, Malaysia* [1992] 2 ILR 117.

It is clear that the order sought to be impugned followed the Practice Note. Thus, the order of limiting the backwages to twenty-four (24) months is not only consonance with the Practice Note No. 1 of 1987 but is also in accordance with the established principle of equity and good conscience of the industrial relations practice.

It is to be noted that 'reinstatement' and 'backwages' are two separate things and one is independent of the other. They have no connection with each other. The order of reinstatement is a prospective order to take effect on 15 September 1996, whereas the order of backwages is ordered to take effect retrospectively. Thus, the Industrial Court in exercising its wide powers, when awarding reinstatement, has the discretion to reduce the backwages, if there are cogent reasons to reduce the amount of backwages of a workman in the sense that his backwages will not be ordered to be paid in full for the duration of the enforced dismissal (see *SK Verma, supra*). Since there are cogent reasons for the backwages to be scaled down to 24 months, the Industrial Court's award is therefore within its power and jurisdiction. The award is justified.

Accordingly, there is no error of law committed by the Industrial Court. I find there is no legal basis whatsoever to the applicant's application to quash the second part of the award limiting the applicant's backwages to twenty-four (24) months salary and substituting it with an order that he be paid full backwages from the date of dismissal to the date of his reinstatement.

For the above reasons, I dismiss the application with costs.